Supreme Court, U.S.
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No

In The

Supreme Court of the United States

Thomas J. Yarcheski,
Petitioner
v.
Kevin Reiner, Celia Miner, and Johnson, Heidepreim, Miner, Marlow & Janklow, LLP,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH DAKOTA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Yarcheski v. Reiner, Miner, and Johnson, Heidepreim, Miner, Marlow & Janklow, LLP*, 669 NW2d 487 (SD 2003 108), the South Dakota Supreme Court used a standard of review called "substantial compliance" to determine whether the non-renewal of a faculty contract at the University of South Dakota violated the due process provisions of the negotiated labor-management contract. The South Dakota Supreme Court relied on the definition of "substantial compliance" used earlier by the Utah Supreme Court in 1981. Although "substantial compliance" is rationally appealing to excuse an "i" that is not dotted and a "t" that is not crossed, this standard of review is constitutionally vague and it can dismantle the due process rights and protections carefully built into a labor-management contract. The standard of review called "substantial compliance" can also be used to abrogate stipulations by the parties, and to camouflage violations of academic freedom.

The questions presented by this case are:

1. Whether the standard of review called "substantial compliance" is constitutionally vague.
2. Whether the constitutional vagueness of the standard of review called "substantial compliance" allowed the improper substitution of the Court's will over the lawful will of the parties in a negotiated labor-management contract.
3. Whether the nonrenewal of the Petitioner's faculty contract by the University of South Dakota was arbitrary and capricious.
4. Whether the standard of review called "substantial compliance" camouflaged a violation of academic freedom by the University of South Dakota in allowing student opinion surveys to control the nonrenewal of a faculty contract.

PARTIES TO THE PROCEEDINGS BELOW

All the parties to the proceedings below are listed in the caption on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Thomas J. Yarcheski petitions for a writ of certiorari to review the judgment of the South Dakota Supreme Court.

OPINIONS BELOW AND JURISDICTION

The Appendix accurately reproduces the Memorandum Opinion from the First Judicial Circuit Court (Yankton, South Dakota), filed August 12, 2002 (Appendix A), and the Opinion of the South Dakota Supreme Court, filed September 3, 2003 (Appendix B). The South Dakota Supreme Court denied (and filed) the Petitioner's request for rehearing without elaboration on October 21, 2003 (Appendix C). This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The First Amendment to the U. S. Constitution, made applicable to the states by the Fourteenth Amendment, provides in relevant part: "Congress shall make no law * * * abridging the freedom of speech, or of the press." U. S. Const. Amend. I.

The Fifth Amendment to the U. S. Constitution provides in relevant part: "No person shall be * * * deprived of life, liberty or property, without due process of law." U. S. Const. Amend V.

The Fourteenth Amendment to the U. S. Constitution provides in relevant part: "No state shall * * * deprive any person of life, liberty, or property, without due process of law." U. S. Const. Amend. XIV.

STATEMENT OF THE CASE

This case began as a grievance action by the Petitioner, Thomas J. Yarcheski, against the University of South Dakota and the South Dakota Board of Regents for the nonrenewal of his faculty contract. The grievance was governed by a negotiated labor-management contract between the Council of Higher Education (a recognized collective bargaining agent) and the South Dakota Board of Regents (hereafter referred to as the "COHE contract," or "BOR/COHE contract," or "COHE"). The Petitioner, Thomas J. Yarcheski, had retained attorney Celia Miner and her law firm of Johnson, Heidepreim, Miner, Marlow & Janklow, LLP (Yankton, South Dakota) to represent him. At the time, attorney Kevin Reiner was an associate of the firm. During the judicial process, the Petitioner's attorney missed a filing deadline in 1995 and the case was dismissed. After appeal of the dismissal was denied by the South Dakota Supreme Court, the original case became a case of legal malpractice. The legal malpractice complaint commenced on January 28, 2000. The case-within-a-case was the grievance action against the University of South Dakota and the South Dakota Board of Regents that was started in 1992.

Contrary to judicial custom, neither the First Judicial Circuit Court (Yankton, South Dakota), nor the South Dakota Supreme Court ever considered the issue of legal malpractice for missing the filing deadline. In ruling against the Petitioner, both focused exclusively on the underlying case-within-a-case involving the grievance against the University of South Dakota.

In *Yarcheski v. Reiner, Miner, and Johnson, Heidepreim, Miner, Marlow & Janklow, LLP*, 669 NW2d 487 (SD 2003 108), both the South Dakota Supreme Court, and the lower First Judicial Circuit Court, used the standard of review called "substantial compliance" to determine whether the due process provisions of the labor-management

contract had been violated. Both, however, defined the standard differently. In the lower court, the First Judicial Circuit Court, the standard focused on "contractual violations" and how they "prejudiced" the Petitioner's "substantial rights." The complete definition by the lower court stated: "Substantial compliance with the contract procedures is all that is necessary. It need not be perfect. The burden is on the plaintiff to show that the claimed contractual violations prejudiced his substantial rights." (Appendix A, p. 14). The Circuit Court referenced *Beville v. University of South Dakota*, 420 NW2d 9 (SD 1988). The Circuit Court's reference to "contract procedures" was non-specific, and instead of holding violations of guaranteed due process provisions to be presumptively prejudicial, the lower court added the burden of proof to the faculty member.

In contrast, the standard of review called "substantial compliance" used by the South Dakota Supreme Court focused on the "substantial interests" of the parties to the negotiated labor-management agreement being "in fact satisfied and protected." The complete definition used by the South Dakota Supreme Court stated: "While exact conformance with the precise terms of the termination procedures is doubtless the least controversial course, so long as the substantial interests those procedures are designed to safeguard are in fact satisfied and protected, failure to conform to every technical detail of the termination procedure is not actionable." (Appendix B, p. 32.) The South Dakota Supreme Court was relying on the Utah Supreme Court in *Piacitelli v. Southern Utah State College*, 636 P2d 1063, 1067 (Utah 1981). The Utah Supreme Court was narrowly considering "termination procedures," and not broader issues such as the evaluation procedures, procedures for corroborative investigations of performance, and evaluation criteria.

The South Dakota Supreme Court, in framing its definition of "substantial compliance" also cited *Stensrud v.*

Mayville State College, 368 NW2d 519, 522 (ND 1985): "Generally, substantial compliance with the procedural requirements for termination is sufficient if their purpose is fulfilled." (Appendix B, p. 32.) Like the Utah Supreme Court, the North Dakota Supreme Court focused narrowly on "requirements for termination," not the broader issues associated with this case. In contrast to the other definitions of the standard of "substantial compliance," the North Dakota Supreme Court's definition rested on the "purpose" of a procedural requirement and whether it was "fulfilled."

In reviewing the underlying case-within-a-case, the provisions of the COHE contract that the two courts implicitly found insubstantial were provisions that the parties to the contract held to be mandatory. Those provisions were explicitly worded. The parties to the labor-management contract expressed their sensitivity to the wording of those provisions early in the contract: "'Will' is a verb having the mandatory sense of 'shall' or 'must.' It is a word of certainty, while the word 'may' is one allowing discretion." All of the contract provisions implicitly held by both courts to be insubstantial had the verbs of either "will," or "shall," or "must."

The case-within-a-case began in 1991 when the Petitioner accepted a tenure track appointment as Associate Professor of Health Administration, School of Business, University of South Dakota. Within the system of performance evaluation specified by the COHE contract, the Petitioner expected continued employment. The Petitioner's previous academic appointment was at St. Joseph College, Standish, Maine, where the president of that college (in multiple sworn statements) described the Petitioner's teaching performance as "masterful." [The South Dakota Supreme Court, in a footnote in its Opinion, and without any supporting evidence in the record, held that the Petitioner's contract at St. Joseph College "was also not renewed because of his teaching performance." (Appendix B, p. 22).]

On January 31, 1992, approximately halfway through his first year of service, the Petitioner's immediate supervisor/department head, Professor Michael Myers, JD, submitted a letter to the dean of the School of Business, Jerry Johnson, recommending that Yarcheski's faculty contract not be renewed. His letter failed to state a reason. As defined by the COHE contract, Yarcheski was a "faculty unit member," and according to the contract, "All faculty unit members will be evaluated annually." Myers had failed to do the mandatory evaluation on Yarcheski. The verb "will," as noted above, was a verb of certainty. The university had no discretion in that matter, and the requirement that "all" faculty will be evaluated annually had no exceptions or qualifications of any kind. The COHE contract was void of any language that referred to first-year faculty as "probationary," and void of any language that segregated first-year faculty into a separate class.

As noted, prior to making his recommendation, Myers had failed to complete the mandatory evaluation system specified in the COHE contract. He invented his own system. Approximately ten days before he made his recommendation, Myers had put together his own unique scheme for evaluating the Petitioner. In his own written words, Myers stated that his purpose was to provide "a clear and prompt process for assessing your [Yarcheski's] performance." Myers further wrote that his evaluation plan "will allow us to substantiate a rationale for contract renewal, or if we are unable to obtain a more favorable assessment, provide a fair and objective basis for nonrenewal." His scheme was grossly inconsistent with the COHE contract, and it was never completed. Despite his intention to create an "objective basis for nonrenewal," Myers failed to put his evaluation of Yarcheski in writing. As specified by the COHE contract, "the performance evaluation will be in written form and will be signed by the department head." That requirement was mandatory.

[When the legitimacy of Myers' evaluation scheme for Yarcheski was later challenged at an evidentiary hearing held on August 20, 1992, in conjunction with the administrative law process, the attorney for the University of South Dakota and the South Dakota Board of Regents stated: "I'll stipulate that the university has only one evaluation system provided in COHE." His reference to "only one" made Myers' scheme, and all others outside the COHE contract, illegitimate. When the South Dakota Supreme Court stated in its Opinion that "nothing in the evaluation and nonrenewal provisions [of the COHE contract] indicates that the evaluation is the exclusive source of information for personnel decisions," it was abrogating the stipulation made by the university's attorney. (Appendix B, p. 35).]

The purposes of performance evaluation are clearly and rationally evident, and as noted above, were understood and accepted by Yarcheski's supervisor, Myers. The COHE contact, furthermore, specifically stated that one of the purposes of faculty evaluation is to "provide basic information for personnel decisions such as discipline, contract renewal, salary and pay matters, tenure and promotion." According to the COHE contract, as will be elaborated later, "the notice [of nonrenewal] will state the reasons for the decision." The university was specifically required by the COHE contract to give a reason for not renewing a faculty member's contract, and as undisputed by the Circuit Court and the South Dakota Supreme Court, the reason had to be based on performance (in contrast to, for example, religious affiliation, or sexual preference, or political party). As noted, the university's attorney stipulated that the university had "only one" evaluation system found in the COHE contract. The COHE contract's evaluation system, in other words, generated any and all reasons given for not renewing a faculty member's contract.

On February 7, 1992, seven days after the Petitioner's supervisor submitted a letter to the dean, Jerry Johnson,

recommending that the Petitioner's contract not be renewed, Johnson submitted a memorandum to Steven Hazlett, vice president for academic affairs, recommending that the Petitioner's faculty contract not be renewed. His memorandum had no performance evaluation attached, and it failed to state a reason for the recommendation. According to the COHE contract, "The vice president/dean will review the completed evaluation and make appropriate comments to the president about contract renewal, augmentation monies, promotion, or tenure, and/or performance." The case involved contract renewal. The dean of the School of Business had no performance evaluation to review. Myers had failed to do one. The system of faculty evaluation specified by the COHE contract required either the dean, or the vice president for academic affairs, to sign the completed performance evaluation. It further required the administrator who reviewed the completed performance evaluation to attest, "I have reviewed these comments and ratings." Those requirements were mandatory.

In response to the recommendations made by the Petitioner's supervisor and dean, on February 12, 1992, the Petitioner filed a grievance with the university president, Betty Turner Asher, contending that the COHE contract had been violated. Through letter dated February 19, 1992, the university president replied and indicated that the grievance was premature because she had not yet sent him a notice of non-renewal. As noted earlier, notices of non-renewal were required to state the reasons for the action. And as will be noted later, the reason that the president would finally give would be performance-based.

After Yarcheski had filed his grievance, the university president, Betty Turner Asher, contacted the dean of the School of Business, Jerry Johnson, who in turn contacted Yarcheski's supervisor, Michael Myers. Myers then hurriedly tried to prepare a "Professional Staff Evaluation" on Yarcheski as prescribed by the COHE contract. Like the

unique scheme Myers had invented for evaluating Yarcheski a few weeks earlier, Myers never completed it. In the margin of the evaluation Myers hastily completed on Yarcheski, he indicated in a hand-written note that he had sent copies to the dean, Jerry Johnson, and to the university president, Betty Turner Asher. Myers dated what was now the second so-called evaluation on Yarcheski February 19, 1992.

In the evaluation form done on Yarcheski, Myers wrote only one sentence concerning Yarcheski's teaching performance: "Teaching—Student evaluations indicated students did not learn relevant material, indicated assignments were not helpful, and there was a lack of systematic presentations. Rating—Unsatisfactory." The "student evaluations" used by Myers, as corroborated later through is testimony, were in fact student opinion surveys. The above sentence represents the entire text of Myers' evaluation of Yarcheski's teaching. He relied on nothing else but student opinion surveys. In simple but powerful language, the COHE contract stated: "Student opinion surveys will not be used as the controlling criteria for personnel actions." The COHE contract further states that a personnel action includes "discipline, contract renewal, salary and pay matters, tenure, and promotion." The action in this case concerned contract renewal.

[The "student opinion surveys" that Myers relied on in evaluating Yarcheski's teaching performance are not contained in the record of this case. At the evidentiary hearing held on August 20, 1992, the university failed to produce them and enter them into the record. Although Yarcheski had only been on faculty five months when Myers evaluated his performance, Myers also rated his research as "unsatisfactory."]

If Myers had, in fact, suspected deficiencies in Yarcheski's teaching performance because of student opinion surveys, then the COHE contract required him to

take another step: "The department head... shall investigate such deficiencies by evaluative means, other than by student opinion surveys." That requirement was mandatory. The COHE contract further required that "Only if such investigation corroborates the results of the student opinion surveys shall the faculty unit member's department head include in the evaluation the deficiencies in performance suggested in the student opinion surveys."

Myers never conducted a corroborative investigation concerning Yarcheski's teaching. Approximately four weeks before Myers did his second evaluation on Yarcheski dated February 19, 1992, he had observed one of Yarcheski's classes. The associate dean, Robert Reinke, also attended that class. (According to the COHE contract, Reinke had no evaluative or supervisory role with respect to either Yarcheski or Myers; he attended the class as Myers' friend.) Neither Myers nor Reinke ever prepared a report of their visit. Yarcheski testified that immediately after the class Myers told him that the class was "too good to be true." The fact that Myers and Reinke never prepared a report concerning their one classroom visit, and the fact that Myers never conducted a corroborative investigation, would later by used by both of them at the evidentiary hearing to give a "third" evaluation of Yarcheski using their testimony.

As noted, Myers relied exclusively on student opinion surveys in his evaluation of Yarcheski's teaching. If Myers had done a "corroborative investigation," then the COHE contract required still another step: "If the student opinion surveys indicate a deficiency in performance of duties, the results of the department head's corroborative investigation, as well as the faculty member's response to the [student] survey, must be attached [to the evaluation]." This requirement, given the deliberate use of the verb "must," was mandatory. Yarcheski had nothing to respond to other than the improper control exercised by student opinion surveys.

Myers also failed to complete two other explicit requirements required by the COHE contract in his evaluation of Yarcheski. The first requirement stated: "The faculty unit member's department head shall prepare a statistical profile and a narrative summary of the student opinion surveys." Like the results of the "corroborative investigation" described above, that statistical profile and narrative summary "will be attached and made a part of the performance evaluation." Myers failed to prepare any such statistical profile and narrative summary. The second requirement stated: "Upon request to the department head, a faculty unit member shall receive in writing the guidelines and performance expectations intended to be used for the performance and evaluation of the faculty unit member." Despite two written requests by Yarcheski to Myers, Myers never produced any statement concerning the guidelines and performance expectations he intended to use in Yarcheski's evaluation. Myers did, however, attach to his so-called second evaluation of Yarcheski the rankings of all faculty in the School of Business according to student opinion surveys. That was the only attachment Myers provided to Yarcheski's evaluation. Myers found those rankings important.

On February 27, 1992, as required by the COHE contract, Myers held a meeting with Yarcheski to inform him that he had recommended that his faculty contract not be renewed. Robert Reinke, associate dean, was present as a witness for the administration. (Myers and Reinke were astute enough to make certain a witness was present, but neither had ever prepared a report of their one visit to Yarcheski's class, and Myers failed to fulfill all of the due process requirements mandated by the COHE contract.) On the same day, after that meeting, the dean of the School of Business, Jerry Johnson, sent a memorandum directly to the university president, Betty Turner Asher, recommending for a second time that Yarcheski's faculty contract not be renewed. Johnson's memorandum to the president bypassed

his supervisor, the vice president for academic affairs, Steven Hazlett. Johnson's second recommendation directly to the president failed to cite a reason (like his first), and it failed to attach the performance evaluation that was done on Yarcheski by Myers on February 19, 1992. Johnson's memorandum failed to indicate in any way that he had reviewed Yarcheski's performance evaluation. [During the discovery process prior to the evidentiary hearing held on August 20, 1992, the university produced the faculty evaluation done on Yarcheski by his supervisor Myers on February 19, 1992. It had the signature of the vice president for academic affairs, but was not dated.]

Through a letter from the university president, Betty Turner Asher, dated February 29, 1992, Yarcheski was given notice that his faculty contract would not be renewed. The letter cited a reason for the personnel action: "inadequate teaching." Clearly, the president gave a performance-based reason. Myers had rated both Yarcheski's teaching and research as "unsatisfactory," but the university president focused only on teaching. [At the evidentiary hearing held on August 20, 1992, in conjunction with the administrative law process, the university president testified that the evaluation done on Yarcheski by his supervisor, Myers, on February 19, 1992, was "irrelevant" to the non-renewal action. The university president did not elaborate on how or where she received the information to conclude that Yarcheski's teaching was "inadequate." In effect, she created a mystery.]

On April 8, 1992, approximately five weeks after the university president had notified Yarcheski that his faculty contract would not be renewed because of "inadequate teaching," the university president asked Yarcheski's supervisor, Myers, to draft a letter summarizing the basis for not renewing Yarcheski's faculty contract. In his draft for the president, Myers wrote: "The primary materials for supporting the recommendation [for not renewing your

faculty contract] are contained in the substantial negative commentary contained in the Harvard evaluation forms as well as the USD evaluation form which place your performance below acceptable standards." The "Harvard evaluation forms," and the "USD evaluation form" are in fact student opinion surveys. Like his previous written statement on February 19, 1992, concerning Yarcheski's teaching, Myers failed to cite any other criteria other than student opinion surveys. He did not even allude to his one visit to Yarcheski's class.

The entire record of the case contains only two written sentences from Yarcheski's supervisor, Myers, concerning Yarcheski's teaching performance. Myers, a member of the South Dakota Bar, also taught courses at the university's School of Law, and he knew the importance of the words he used. The only two sentences Myers wrote concerning Yarcheski's teaching performance relied exclusively on one criterion: student opinion surveys.

Although the facts and arguments were fully elaborated, both the First Circuit Judicial Court, and the South Dakota Supreme Court, failed to explicitly address the issue of student opinion surveys being the controlling criteria in the nonrenewal of Yarcheski's contract.

As noted earlier, in pursuing the administrative law process, Yarcheski's attorney, Celia Miner, missed a filing deadline in 1995 and the case was dismissed. The dismissal was upheld by the South Dakota Supreme Court late in 1996. Celia Miner's representation of Yarcheski ended on January 8, 1997.

Also as noted earlier, the legal malpractice action against Celia Miner and her law firm commenced on January 28, 2000. Summary judgment in favor of Celia Miner and the other Defendants was filed in the First Judicial Circuit Court on September 11, 2002. The Plaintiff/Petitioner filed a notice of appeal with the South Dakota Supreme Court on November 8, 2002. On September 3, 2003, the South

Dakota Supreme Court filed its Opinion affirming the judgment of the First Judicial Circuit Court. The Petitioner's motion to the South Dakota Supreme Court for a rehearing was denied (and filed) on October 21, 2003 (Appendix C).

REASONS FOR GRANTING THE WRIT

Application of the standard of review called "substantial compliance" in the case of *Yarcheski v. Reiner, Miner, and Johnson, Heidepreim, Miner, Marlow & Janklow, LLP*, 669 NW2d 487 (SD 2003 108), had several consequences for justice.

1. On its face, the standard of review called "substantial compliance" used by the South Dakota Supreme Court appears to make it easier to enforce the due process protections of the Fifth and Fourteenth Amendments. It discourages trivial challenges at the extreme margins of the Constitution. (see, for example, *Krukar v. Alexander*, 386 F. Supp. 1112 (N.D. Ill., 1974), where a federal district court held that the fourteen days advance notice of termination given to a probationary employee of the Internal Revenue Service, instead of the required fifteen days, was not unconstitutional.) But the standard of review called "substantial compliance" can also violate the Fifth and Fourteenth Amendments. Below the surface, because of its vagueness, "substantial compliance" can dismember the cardinal due process rights and protections consciously built into a negotiated labor-management contract. It can even be used to impose the will of a court contrary to the lawful will of the parties.

Traditionally, courts have respected the right of universities to judge the professional performance of faculty. The COHE contract reflects that tradition: "If the grievance concerns nonrenewal, denial of promotion, or denial of tenure, the grievance review will be limited to determining whether the decision was the result of failure to

follow procedures, unless otherwise provided in this agreement. The burden of proof, in such cases, shall rest with the grievant." In this case, the university's failures to fulfill the mandatory due process provisions explicitly outlined in the COHE contract were profound. They should be regarded are presumptively prejudicial to the Petitioner and contrary to his interests and rights. In this case, as "otherwise provided" in the contract, student opinion surveys were prohibited from controlling the personnel action.

2. As required by the COHE contract, the Petitioner was given a reason for not renewing his faculty contract, and as expected, and without dispute by the courts, that reason was based on performance (i.e., "inadequate teaching"). The body of relevant court decisions overwhelming supports the conclusion that when reasons are given for nonrenewal or termination, those reasons must be performance-based. The attorney for the South Dakota Board of Regents stipulated that there was only one system of evaluation concerning faculty performance: "I'll stipulate that the university has only one evaluation system provided in COHE." The reference to "only one" has a clear and literal meaning. But the president of the University of South Dakota testified that the performance evaluation done on the Petitioner by his supervisor was "irrelevant" to her decision not to renew the Petitioner's faculty contract. The university president created a mystery, a mystery that lingers.

Both the South Dakota Supreme Court, and the lower First Judicial Circuit Court, ignored the fact that the university president had no choice, as mandated by the COHE contract, and stipulated by the university's attorney, except to rely on the performance evaluation done on the Petitioner by his immediate supervisor. Both courts made no attempt to solve the mystery of how the university president arrived at the performance based reason she gave the Petitioner for not renewing his faculty contract ("inadequate teaching"), and implicitly found the contractual violation

insubstantial. Neither court held the university president's decision not to renew the Petitioner's faculty contract to be arbitrary and capricious. The South Dakota Supreme Court not only failed to solve the mystery of where the university president got the performance based information for concluding that the Petitioner had "inadequate teaching," but also abrogated the stipulation made by the attorney for the Board of Regents. In its Opinion, the South Dakota Supreme Court stated: "But nothing in the evaluation and nonrenewal provisions [of the COHE contract] indicates that the evaluation is the exclusive source of information for personnel decisions." (Appendix B, p. 35).

When the Opinion of the South Dakota Supreme Court is extrapolated, the results are sinister. The university president was free to receive information from any party, in any manner, without a written record, without corroboration, without disclosure of the evaluative criteria, and without disclosure of conflicts or bias in making a decision about not renewing a faculty member's contract. According to the Opinion of the South Dakota Supreme Court, the university president was also free to receive information anonymously, or if the parties were known, to withhold their identities. In effect, the Opinion of the South Dakota Supreme Court opened the door to Star Chamber proceedings and essentially gutted the COHE contract of its due process rights and protections.

The nonrenewal of the Petitioner's faculty contract, in light of the president's statement that the performance evaluation done on the Petitioner by his immediate supervisor was "irrelevant" to her decision, and in light of the explicit procedural requirements of the COHE contract, was done without any known rational basis. The necessary conclusion is that the president's action was arbitrary and capricious. The president could have heard voices telling her what to do.

When the university president stated that the COHE style evaluation done on the Petitioner by his supervisor was "irrelevant" to her decision not to renew the Petitioner's faculty contact she assumed two significant burdens. First, she had to prove that she was not violating the COHE contract, and second, she had to prove that she was not acting arbitrarily and capriciously. In both instances, the university president failed. The basis for her decision remains a mystery, a mystery that was highly prejudicial to the Petitioner's rights and destructive to his interests, and a mystery that failed to fulfill the purposes of the due process provisions in the COHE contract. On their faces, no definition of "substantial compliance" cited by the South Dakota Supreme Court would permit such a mystery to stand without judicial reprimand.

3. As required by the COHE contract, when requested by a faculty member, the supervisor must provide a written statement of the guidelines and performance expectations the supervisor intended to use in the faculty member's performance evaluation. Despite two written requests by the Petitioner to his supervisor for that written statement, none was ever provided. [What the supervisor attached to the Petitioner's faculty evaluation were the rankings of all faculty in the School of Business according to student opinion surveys.] Both courts implicitly found the supervisor's failure to disclose the guidelines and performance expectations he used in the Petitioner's evaluation to be insubstantial, and the South Dakota Supreme Court failed to even acknowledge the existence of that requirement.

4. As required by the COHE contract, if student opinion surveys suggested a deficiency in a faculty member's performance of assigned duties, then the supervisor had to conduct a corroborative investigation of those deficiencies "by valuative means, other than student opinion surveys." The COHE contract further required that the results of the

supervisor's corroborative investigation be in writing, and attached to, and made a part of, the faculty member's performance evaluation. While the Petitioner's supervisor attended one of his classes, he never produced any results of a corroborative investigation, and failed to even mention his class observations in his two written sentences (months apart) about Yarcheski's teaching. There were no results from a corroborative investigation attached to, and made a part of, the Petitioner's performance evaluation. The Petitioner had no opportunity to respond to his supervisor's corroborative investigation, as allowed by the COHE contract, because the investigation was never done. Both courts implicitly found that violation insubstantial, and the South Dakota Supreme Court failed to even acknowledge the existence of that requirement. As noted, the university also failed to produce, and enter into the record, the student opinion surveys that were relied upon by the Petitioner's supervisor.

The COHE contract also required the supervisor to prepare a "statistical profile and a narrative summary of the student opinion surveys." Like the results of a corroborative investigation, the supervisor's statistical profile and narrative summary of student opinion surveys was supposed to be attached to, and made a part of, Yarcheski's evaluation. Myers, the supervisor, failed to do that. Both courts implicitly found that violation insubstantial, and both courts failed to even acknowledge the existence of that requirement.

At the evidentiary hearing held on August 20, 1992, the Petitioner's supervisor, and the associate dean, painted a picture of deficiency concerning the Petitioner's teaching performance. They used their testimony (months after the fact) to paint that picture, testimony that was duly rebutted. They were, in effect, trying to "amend" the grossly incomplete written record with their testimony. And they did it long after their good faith adherence to the requirements of the COHE contact, and their competence as

an academic administrators, had been called into question. There are, in fact, no documents of any kind in the record that support the negative picture painted by the Petitioner's supervisor, Myers, and the associate dean, Reinke, about the Petitioner's teaching performance. Only their testimony at the evidentiary hearing.

The due process requirements of the COHE contract were intended to prevent such occurrences, to safeguard the integrity of the process, and to protect the interests of faculty, not to suborn fabrications after the fact. No rational person would tolerate such a moral hazard. In its Opinion, the South Dakota Supreme Court relied extensively on the testimony of the Petitioner's supervisor, and the associate dean, rather than the explicit due process requirements of the COHE contract. (Appendix B, *passim*). This was done despite rebuttal testimony. The record the supervisor was required to produce by the COHE contract (the record that the university administrators were required to review in making a nonrenewal decision) does not exist.

Such reliance on testimony long after the critical events have taken place means that the administrators at the University of South Dakota, in retrospect, will always get it right and always justify their actions. In effect, by relying on the testimony of the Petitioner's supervisor, and associate dean, the South Dakota Supreme Court was permitting a "third" evaluation of the Petitioner. The supervisor, Myers, had invented his own scheme to evaluate the Petitioner late in January of 1992, but never completed it and never put anything in writing. Myers tried a second time late in February, 1992, but cited only student opinion surveys, and failed to complete all of the due process requirements mandated by the COHE contract. Myers tried a third time using his testimony at the evidentiary hearing on August 20, 1992. As stipulated by the university's attorney, the university had only one evaluation system—the one found in

the COHE contract. That "one" system did not allow for amending the record with testimony months after the fact.

If the Petitioner's supervisor, Myers, was giving verbal utterances about the Petitioner's teaching performance early in 1992, before the Petitioner received notice that his faculty contract would not be renewed, then it is reasonable to believe that the university president did not hear them, or if she did, ignored them. The university president testified that the written evaluation Myers had done on the Petitioner was "irrelevant." It is also reasonable to believe that she found his verbal utterances equally as "irrelevant." Based on her testimony, the university president was getting her information about the Petitioner from other, unidentified sources.

5. The conclusion reached by the South Dakota Supreme Court concerning the source of information for faculty personnel decisions should be seen as an error: "But nothing in the evaluation and nonrenewal provisions [of the COHE contract] indicates that the evaluation is the exclusive source of information for personnel decisions." (Appendix B, p. 35). The court's conclusion is inconsistent with the COHE contract and it abrogated a critical stipulation by the university legal counsel: "I'll stipulate that the university has only one evaluation system provided in COHE." The reason given by the university president for not renewing the Petitioner's faculty was a performance-based reason, and according to the stipulation, there was one (and only one) evaluation system for arriving at the reason.

The stipulation made by the university's legal counsel leads to two possible conclusions concerning the action taken by the university president. First, the university president acted arbitrarily and capriciously when she notified the Petitioner that his faculty contract would not be renewed because of "inadequate teaching." The evidence in the record supports that conclusion. The university president had no direct knowledge of the Petitioner's teaching

performance, and her reliance on sources of information other than the performance evaluation system provided in the COHE contract was highly prejudicial to the Petitioner and his substantial rights, was a clear violation of the COHE contract, and was a serious violation of the expressed interests of the Council of Higher Education (COHE) and the faculty it represented.

The second possible conclusion concerns the university president's testimony. This conclusion is speculative. Either the university president was confused when she stated that the performance evaluation was "irrelevant," or more adversely, she was intentionally tying to conceal the fact that the COHE system of evaluation had been grossly violated, and that the only criterion for the recommendations she had received concerning the nonrenewal of the Petitioner's contract was student opinion surveys.

The university president knew that the COHE contract's explicit prohibition against using student opinion surveys as the controlling criteria in personnel actions had been violated, as well as all of the contract's cardinal due process rights and protections. The university president knew those facts because, as indicated by the marginal note in the evaluation done on the Petitioner by his supervisor on February 19, 1992, the supervisor sent her a copy. Her knowledge of those facts was reinforced when, on April 8, 1992, Yarcheski's supervisor, Myers, drafted a letter for the president's signature summarizing the reasons for not renewing Yarcheski's faculty contract. In that draft letter, once again, the exclusive evaluative criterion used by Myers was student opinion surveys.

6. The fact that Myers failed to fulfill the mandatory due process requirements of the COHE contract concerning Yarcheski's evaluation—there was no statement of the guidelines and performance expectations, no corroborative investigation, no statistical profile and narrative summary of student opinion surveys—meant that Yarcheski had no

opportunity to challenge the basis for Myers' conclusions. There were only the student opinion surveys, student opinion surveys that the university never produced. The fact that the university president held Myers' evaluation on Yarcheski of February 19, 1992, to be "irrelevant" to her decision not to renew Yarcheski's contract also meant that Yarcheski, again, had no opportunity to challenge the basis for her conclusion. In *Perry v. Sindermann*, 408 US 593, this Court definitively established the right to such an opportunity.

7. If the evaluation done on the Petitioner by his supervisor on February 19, 1992, is accepted by this Court as the only contractually legitimate source of performance information about the Petitioner and the non-renewal of his contract, and if this Court dismisses the testimony of the Petitioner's supervisor given months after the critical events had taken place as a self-serving violation of the COHE contract, then this Court should also conclude that the Petitioner's academic freedom was violated. The violation of his academic freedom was camouflaged by the use of the standard of review called "substantial compliance." The Petitioner's teaching was controlled not by his faculty colleagues, or the university's academic administrators, but instead by students. That control violated the Petitioner's freedoms under the First Amendment and it resulted in the nonrenewal of his tenure track faculty contract. This Court has previously protected First Amendment freedoms in generally similar circumstances. (See *Mt. Healthy City School District Board of Education v. Doyle*, 429 US 274, and *Pickering v. Board of Education*, 391 US 563.) And, within the legacy of this Court's decisions, those freedoms are guaranteed to both tenured and non-tenured faculty. (See *Perry v. Sindermann*, 408 US 593.)

The decision not to renew the Petitioner's faculty contract was made, in essence, by students through their student opinion surveys. For reasons never established by the university through the mandatory due process provisions

of the COHE contract, the students disliked the Petitioner's exercise of his constitutionally protected freedoms under the First Amendment. The university's administrators blindly followed student opinion surveys. When the Petitioner's supervisor, Myers, attached to the Petitioner's evaluation the rankings of all faculty in the School of Business according to student opinion surveys he was making a profound statement about student opinion surveys in his evaluation of the Petitioner and their importance at the School of Business.

When Myers invented his first scheme for evaluating the Petitioner late in January of 1992, outside the boundaries of the COHE contract, one part of his scheme required the Petitioner to prepare a "plan for corrective action" to "concerns as expressed in the student evaluations." Myers extracted criticisms from eight student opinion surveys and expected the Petitioner's "plan for corrective action" to remedy those criticisms. One student criticism stated: "Asks questions from both books, but does not lecture over them." Another stated: "Does not teach what we want at this point in our education." And another: "We never told what to read or when to." Myers was a blind servant of the students.

As stated in the COHE contract, "subject to accepted standards of professional responsibility," academic freedom "is intended to guarantee those rights which are recognized as flowing from the First Amendment to the United States Constitution." The contract defines academic freedom to include "the right to study, discuss, investigate, teach and publish." The contract further states: "Faculty unit members are entitled to freedom in the discussion and presentation of their subject and are privileged to introduce various scholarly views."

Student opinion surveys are a reasonable part of a rational program for evaluating faculty. But student opinion surveys should only sensitize faculty and academic administrators, not control them. As noted above, the COHE contract, like the courts, allowed the University of South

Dakota to temper First Amendment freedoms with "accepted standards of professional responsibility." Student opinion surveys do not constitute "standards of professional responsibility," either accepted or unaccepted. Students are not professionals, and students are not members of the academy. Apart from the last-ditch efforts by the Petitioner's supervisor, and associate dean, to establish cause for the personnel action through their testimony at the evidentiary hearing on August 20, 1992, there is nothing in the record that even suggests the Petitioner's teaching did not conform to accepted standards of professional responsibility. The efforts by Myers and Reinke to establish cause with their testimony were, it appears, an exercise in self-delusion. According to her testimony, the university president held the supervisor's evaluation of the Petitioner to be "irrelevant," and it is reasonable to believe, also the associate dean's. The university president was getting her information about the Petitioner from other, unidentified sources.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 30,2003

APPENDIX A: MEMORANDUM OPINION OF THE FIRST JUDICIAL CIRCUIT COURT (YANKTON, SOUTH DAKOTA), THE HONORABLE ARTHUR L. RUSCH, AUGUST 10, 2002, FILED AUGUST 12, 2002

Thomas J. Yarcheski,
Plaintiff

v.

Kevin Reiner, Celia Miner, and Johnson, Heidepreim, Miner, Marlow & Janklow, LLP,
Defendants

(CV-00-44, Yankton County)

This matter is before the Court pursuant to the defendants' motion for summary judgment. Defendants filed a brief in support of their motion on December 21, 2001. Plaintiff (who is acting *pro se* in this matter) filed a 45-page objection to the defendants' motion for summary judgment and response to their supporting brief on March 5, 2002. Defendants filed a reply brief on April 1, 2002 and plaintiff then filed a "Final Response to the Defendant's Motion for Summary Judgment and Addition to the Plaintiff's Counter-Motion for Summary Judgment" dated April 8, 2002. Oral argument was had on the motion on May 7, 2002.

FACTS

Plaintiff was employed by the University of South Dakota as an Associate Professor in the School of Business

for the 1991-1992 school year.[1] During his first year of employment the University determined not to renew his contract.

Plaintiff then employed attorney Celia Miner to assist him in taking appropriate appeals. Miner directed Kevin Reiner, an associate in the Johnson, Heidepreim, Miner, Marlow & Janklow law firm, to assist her. Miner and Reiner pursued an appeal to the South Dakota Board of Regents and South Dakota Department of Labor. Plaintiff lost at both stages.

Plaintiff then directed Miner and Reiner to file an appeal of the Department of Labor decision to the Circuit Court. The Notice of Appeal was filed on March 10, 1994 (Hughes County CIV 94-105). Although Reiner left the law firm in 1994, he prepared an opening brief to the Circuit Court which was served on April 13, 1995.

The South Dakota Board of Regents moved to dismiss the appeal because the brief had not been within one year. On July 10, 1995, the Circuit Court in Hughes County dismissed the appeal. Plaintiff appealed that dismissal to the South Dakota Supreme Court (Appeal #19329). On December 9, 1996, the South Dakota Supreme Court summarily affirmed the decision of the Circuit Court dismissing plaintiff's appeal.

PROCEDURAL HISTORY

On January 28, 2000, plaintiff commenced this action alleging legal malpractice by Reiner, Miner and their law firm. Initially plaintiff was represented by attorney Bruce Anderson of Wagner and defendants were represented by attorney William Fuller of Sioux Falls.

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[1] His employment contract incorporated the COHE (Council of Higher Education) contract by reference.

In February of 2000, Fuller removed this action to the United States District Court. However, on its own motion, the District Court held that removal was improper and remanded the case back to the First Circuit Court.

Thereafter present counsel began representing defendants. Beginning in September of 200, they made extensive efforts to depose the plaintiff. On January 19, 2001 plaintiff's attorney moved this Court to determine where plaintiff's deposition should be taken. On January 24, 2001 this Court heard that motion, construing it as a motion for a protective order authorized under SDCL § 15-6-26(c. The Court denied plaintiff's request to order that his deposition be taken in Maine and set the deposition for January 31, 2001.

Thereafter, attorney Bruce Anderson moved to withdraw but, at plaintiff's request, filed a petition for an intermediate appeal of this decision. Plaintiff objected to his attorney's withdrawal. On March 13, 2001, this Court allowed Bruce Anderson to withdraw from the case effective after the taking of the deposition on May 2nd. Later that order was modified to be effective immediately.[2] In the fourteen months that have elapsed since that time plaintiff has been unable to find any other attorneys willing to represent him.

On February 14, 2001, defendants moved the Court for an order compelling plaintiff to appear for his deposition. On March 2, 2001, this Court entered an order compelling plaintiff to appear to have his deposition taken on May 2,

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[2] The Court allowed attorney Anderson to withdraw from the case because of plaintiff's abusive and threatening conduct towards him. Despite the fact that plaintiff was objecting to Anderson's withdrawal, he was sending communications to him threatening him with complaints to the bar ethics committee, claiming that he was "professionally impaired" and stating "Please seek clinical treatment." The Court concluded that these statements by plaintiff demonstrated such a breakdown of the attorney/client relationship that no reasonable attorney could continue to represent him under those circumstances.

2001. On March 9, 2001, the Supreme Court denied the petition for intermediate appeal.

On December 21, 2001, defendants moved for summary judgment based upon two volumes of exhibits as well as separate affidavits of Thomas Welk and Celia Miner. On January 7, 2002, plaintiff moved to stay the motion for summary judgment and for an expedited hearing on his motion to stay. On January 14, 2002 this Court stayed the proceedings to the extent of extending the briefing schedule. On March 5, 2002, plaintiff filed a further motion for a continuance in the summary judgment proceedings. On March 6th this Court denied that motion. On March 5th the plaintiff also filed a "Counter-Motion for Summary Judgment." At the hearing on May 7, 2002 the Court denied plaintiff's motion for summary judgment. Plaintiff then filed a petition for an intermediate appeal of that decision. On June 26, 2002, the Supreme Court denied that petition for an intermediate appeal.

DECISION

I. STANDARD OF REVIEW

Summary judgment is proper only when the moving party shows that such relief is merited as a matter of law because there are no genuine issues of material fact. First Western Bank v. Livestock Yards, 444 NW2d 387 (SD 1989). Caneva v. Miners and Merchants Bank, 335 NW2d 339 (SD 1983). Summary judgment is an extreme remedy, which should only be granted when there are no genuine issues of material fact.[3] It is not a substitute for a trial when

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[3] In Weiss v. Van Norman, 1997 SD 40, 562 NW2d 113 the South Dakota Supreme Court stated: "A disputed fact is not 'material' unless it would affect the outcome of the suit under the governing substantive law in that a 'reasonable jury could return a verdict for the nonmoving party.'" Parsons v. Dacy, 502 NW 2d 108, 110 (SD 1993) (quoting

there are genuine issues. The burden of proof is upon the moving party to show clearly that there are no genuine issues of material fact and that they are entitled to judgment as a matter of law. Klatt v. Continental Ins. Co., 409 NW2d 366 (SD 1987). Summary judgment is only appropriate when the court determines that the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits of the parties, reveal that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. SDCL § 15-6-56(c); Breen v. Dakota Gear & Joint CO., Inc., 433 NW2d 221, 223 (SD 1988). A mere surmise that a party will not prevail at trial is not a sufficient basis to grant summary judgment.

In addressing a motion for summary judgment: (1) the burden of proof is on the moving party; (2) the court views the evidence most favorably to the non-moving party; (3) summary judgment is not a substitute for trial; (4) summary judgment is not appropriately granted just because the court believes the non-moving party will not prevail at trial; and (5) summary judgment is an extreme remedy and should be awarded only on a clear showing of the necessary elements. Wilson v. Great Northern RR. Co., 157 NW2d 19 (SD 1968); Production Credit Ass'n v. Wynne, 474 NW2d 735, 737-38 (SD 1991).

While the moving party has the burden of showing that there are no genuine issues of material fact, the non-moving party cannot merely rest on the pleading, but must present

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Anderson v. Liberty Lobby, Inc., 477 US 242, 248, 106 SCt 2505, 2510, 91 Led2d 202, 212 (1986); see also Celotex Corp. v. Catrett, 477 US 317, 322-23, 106 SCt 2548, 2552, 91 Led2d 265, 273 (1986) (stating that the rule "mandates the entry of summary judgment...against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.").

specific facts by way of "...affidavits or as otherwise provided in § 15-6-56..." setting forth specific facts showing the existence of genuine issues of material fact. Baatz v. Arrow Bar, 452 NW2d 138 (SD 1990). Mere general allegations or denials will not prevent the issuance of summary judgment. Weiszhaar Farms, Inc. v. Livestock State Bank, 467 NW2d 752 (SD 1991); Werner v. Norwest Bank of South Dakota, N.A., 499 NW2d 138 (SD 1993). The party opposing summary judgment must establish the specific facts which show that a genuine and material issue for trial exists. Anderson v. Production Credit Ass'n, 482 NW2d 642, 644 (SD 1992).

II. A "CASE WITHIN A CASE."

This action is one for legal malpractice arising from defendants' failure to timely file a brief in plaintiff's appeal from an adverse decision of the Department of Labor. This resulted in a dismissal of the appeal. The dismissal was upheld by the Supreme Court.

Because of the fact that this is an action for legal malpractice, the plaintiff has the burden of proving a "case within a case."

> In a legal malpractice case, the plaintiff must prove:
>
> 1. the existence of an attorney-client relationship giving rise to a duty;
> 2. that the attorney, either my an act or a failure to act, violated or breached that duty;
> 3. that the attorney's breach of duty proximately caused injury to the client; and
> 4. that the client sustained actual injury, loss or damage.

(citations). Concerning the third element, proximate cause, Meiselman states:

[I]n attorney malpractice, the causal requirement is worded in the negative. For example, it is often said that the plaintiff can recover against the defendant-attorney only when it can be shown that the injury would not have occurred "but for" the negligence of the lawyer. Thus, the plaintiff must establish that the total or partial loss would not have occurred had it not been for some act or omission on the part of the attorney. In other words, the plaintiff must show that "but for" the negligence of the lawyer, the client's cause of action or defense against a claim in the underlying action would have been successful. Meiselman, supra at 40.

A client's burden of proving injury as a result of his attorney's negligence is especially difficult to meet when the attorney's conduct prevented the client from bringing his original cause of action or the attorney's failure to appear caused judgment to be entered against him as a defendant. In addition to proving negligence a client must show that but for his attorney's negligence he would have been successful in the original litigation. "'Accordingly, the client seeking recovery from his attorney is faced with the difficult task of proving two cases within a single proceeding.'" (citation).

The manner in which the plaintiff can establish what should have transpired in the underlying action is to recreate, i.e. litigate, an action which was never tried. This procedure of recreating the underlying action is know as

> a suit within a suit, a trial within a trial, an action within an action, a case within a case, to name but a few of the designations. (citations). The objective is to establish what the result would have been had the case been filed. (citation). This is the accepted and traditional means of resolving the issues involved in the underlying proceedings in a legal malpractice action. Id. This procedure amounts to trying tow separate and distinct lawsuits.
>
> Thus, the plaintiff in a legal malpractice case has not only to prove the four elements basic to negligence cases, but may be asked to prove three additional factors: 1) that the underlying claim was valid, 2) that it would have resulted in a favorable judgment had it not been for the attorney's error, and 3) the amount of the judgment and that the judgment was collectible. (citation).

Haberer v. Rice, 511 NW2d 279, 284-285 (SD 1994). Consequently, one of the essential elements of plaintiff's claim is that he would have succeeded in his appeal. It doesn't matter how negligent defendants were, unless plaintiff would have prevailed on the appeal because he suffered no damages as a result.

II. THE TRIAL COURT MUST DECIDE WHETHER THE APPEAL WOULD HAVE BEEN SUCCESSFUL.

By this motion for summary judgment, defendants argue that plaintiff's underlying appeal (from the decision of the Department of Labor) was without merit and would not have resulted in a favorable decision even if defendants had not erred. If the issue of the success of the underlying appeal is

for the jury to determine, then there is a genuine issue of material facts and the motion for summary judgment must be denied. However, if that issue is for the Court to decide, then the matter can be reviewed by this Court and a determination made as to whether the underlying appeal would or would not have been successful.

Haberer talks about different ways in which the "case within a case" or "trial within a trial" can be submitted to a jury. However, this case is different in that the underlying case in where the error was allegedly made was an administrative appeal (see SDCL chpt. 1-26). They are not normally triable to a jury.

> An appeal shall be allowed in the circuit court to any party in a contested case from a final decision, ruling or action of an agency. SDCL § 1-26-30.2.
>
> The review shall be conducted by the court without a jury and shall be confined to the record. A trial de novo shall not be granted unless otherwise authorized by law... SDCL § 1-26-35.

Two recent cases in which issues the same as, or similar to, those in plaintiff's underlying appeal were decided by the Court (without a jury) include Beville v. University of South Dakota, 420 NW2d 9 (SD 1988) and McCauley v. South Dakota School of Mines & Technology, 488 NW2d 53 (SD 1992).

The issue of whether the case within a case (plaintiff's appeal) should be decided by the court or by a jury appears to be a matter of first impression in South Dakota. However this issue was addressed by the Supreme Court of Michigan in Charles Reinhart Co v. Winiemko, 513 NW2d 773 (Mich, 1994). In that case the Court said:

> "Since the basic premise of trying the underlying action is to prove what the result should have been, the guiding principle in

> identifying issues of law and fact is to utilize the same classification as should have been applied in the underlying case." (citation). Thus, whether an appeal lost because of an attorney's negligence would have succeeded if properly pursued is an issue for the court because the resolution of the underlying appeal originally would have rested on a decision of law. (citation). With rare exception, appeals are based on and resolved as matters of law, not fact. (citation). Thus, an appellate malpractice action presents an issue of law regarding the success of the underlying appeal within its proximate cause analysis.

At 777. The *Reinhart* Court further quoted with approval the reasoning of the Texas Supreme Court in Millhouse v. Wiesenthal, 775 SW2d 626, 628 (Tex 1989):

> ...[Plaintiff's] petition that the jury should make this determination as a question of fact would require the jury to sit as appellate judges, review the trial record and briefs and decide whether the trial court committed reversible error. A judge is clearly in a better position to make this determination.

IV. ANALYSIS OF THE CASE WITHIN A CASE

The underlying case is an appeal from a decision of the South Dakota Department of Labor. This is an administrative appeal under SDCL chpt. 1-26. Plaintiff argued in his appeal that: 1) the University failed to comply with the provisions of the COHE contract in his termination and 2) the actions of the University administration infringed on his academic freedom.

The appellant has a heavy burden in appeals such as this. Great deference is given to findings of fact by the administrative agency and decisions of the agency must be upheld unless the decision is clearly erroneous or unless the court is left with a definite and firm conviction that a mistake has been made.

> This court reviews the record of administrative agencies in the same manner as the circuit court. SDCL 1-26-37. Appeal of Hendrickson's Health Care, 462 NW2d 655 (SD 1990); Peery v. Department of Agriculture, 402 NW2d 695 (SD 1987); In Matter of Application of Northwestern Bell Tel. Co., 382 NW2d 413 (SD 1986). Since the circuit court affirmed Department's findings of fact and conclusions of law in their entirety, our review is of the agency's findings and conclusions. Matter of Midwest Motor Exp., Inc., Bismarck, 431 NW2d 160 (SD 1988).
>
> Conclusions of law are given no deference on appeal and are freely reviewable. SDCL 1-26-36. Hendrickson's, 462 NW2d at 656; Karras v. State, Dept. of Revenue, 441 NW2d 678 (SD 1989); Sharp v. Sharp, 422 NW2d 443 (SD 1988)). Questions of fact, however, are given greater deference. SDCL 1-26-36. This court does not substitute its judgment for Department's on the weight of evidence pertaining to questions of fact unless Department's decision is clearly erroneous, or is arbitrary, capricious, or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion. Finch v. Northwest School Dist. No. 52-3, 417 NW2d 875 (SD 1988)); Perman v. Dept. of Labor, Unemp.

Ins. D., 411 NW2nd 113 (SD 1987)); Appeal of Templeton, 403 NW2d 398 (SD 1987)); Anderson v. Western Dakota Insurors, 393 NW2d 87 (SD 1986). We will not reverse an agency decision unless we are left with a definite and firm conviction that a mistake has been committed. Finck, 417 NW2d at 878; Matter of Midwest, 431 NW2d at 162; Dakota Harvestore v. S.D. Dept. of Revenue, 331 NW2d 828 (SD 1983); Fraser v. Water Rights Commission, Etc., 294 NW2d 784 (SD 1980). McCauley, supra at 55.

A. Violation of the COHE Contract

Plaintiff argues that, because defendants filed a brief on his behalf claiming that his appeal had merit, they can not now claim that he would have lost the appeal. In effect he claims that every lawyer is a guarantor of the positions that they take in court. If plaintiff's appeal is determined to be meritorious merely because defendants filled a brief for him, arguing that it was meritorious, then no attorney could afford to take any novel, complicated or difficult case. This would have a chilling effect on the availability of representation in new or novel cases. See Charles Reinhart Co. v. Winiemko, supra, footnote 16.

Plaintiff lost at both the Board of Regents and the Department of Labor levels. Following the Department of Labor hearing, the Administrative Law Judge (ALJ) made the following conclusion of law:

> Conclusion of Law II. The procedure followed by the University of South Dakota in connection with non-renewal of Petitioner's contract was lawful and complied in all respects with the requirements of the

negotiated labor agreement and the applicable polices of the University of South Dakota.

Construction of contracts is a question of law for the Court. Alverson v. Northwestern Nat'l Cas. Co., 1997 SD 9, ¶5, 559 NW2d 234, 235; Olson v. United States Fidelity and Guar. Co., 1996 SD 66, ¶6, 549 NW 2d 199, 200. "The primary rule in construction of contracts is that the court must, if possible, ascertain and give effect to the mutual intention of the parties." S & S Trucking v. Whitewood Motors, Inc., 346 NW2d 297 299 (SD 1994) (citing GMS, Inc. v. Deadwood Social Club, Inc., 333 NW2d 442 (SD 1983); Forester v. Weber, 298 NW2d 96 (SD 1980)). "In determining the intent of the parties, we must consider the entire contract." *Id.* (citing Chord v. Pacer Corp., 326 NW2d 224 (SD 1982).

An ambiguous contract will be construed against its drafter but the fact that the parties differ as to the contract's interpretation does not create an ambiguity. Alverson, supra at ¶8. In interpreting contracts, the Courts should use reasonable interpretations without stretching terminology. Opperman v. Heritage Mutual Ins. Co., 1997 SD 85, ¶4, 566 NW2d 487, 490 (citing State Farm Mut. Auto Ins. Co. v. Vostad, 520 NW2d 273, 275 (SD1994)).

In his hearing before the ALJ, Plaintiff argued that the University administration violated §§ 1.7 and 2.1 through 2.3 of the COHE contract. He claims that they failed to provide him with the faculty evaluation which is mandated by those sections.

It should first be noted that substantial compliance with the contract procedures is all that is necessary. It need not be perfect. The burden is on plaintiff to show that the claimed contractual violations prejudiced his substantial rights. Beville v. University of South Dakota, supra at 13-14.

The ALJ found that the procedure followed by the University in connection with non-renewal of Petitioner's contract was lawful and complied in all respects with the

requirements of the negotiated labor agreement and the applicable policies of the University of South Dakota. Plaintiff contends that the ALJ's findings would have been reversed on appeal because there were violations of § 1.7 (Nonrenewal of Tenure Tract Contracts). That section provides, in relevant part:

> Prior to the issuance of a written notice of nonrenewal, the faculty unit member's immediate supervisor will provide the opportunity for a meeting with the faculty unit member to apprise the faculty unit member of the proposed action. The faculty unit member must be given at least five (5) working days written notice of such meeting so that both the faculty unit member and the immediate supervisor may arrange to have present a witness or a representative.
>
> In order to facilitate the relocation of faculty unit members who are not to be rehired, the administration agrees to provide notice of its intent not to rehire any faculty unit members serving under a tenure track contract. The notice will state the reasons for the decision and will be given in accordance with the following schedule.
>
> 1. A faculty unit member who has completed less than one (1) academic year of service under a tenure track contract shall receive written notice of nonrenewal from the institution before March 1 of the current year of appointment.

The facts of this case are undisputed. Plaintiff was a faculty unit member who had completed less than one academic year of service. He had a meeting with his supervisor in which he was advised of the proposed action

(February 27th). He received written notice of non-renewal from the institution before March 1 of the current year of appointment and the notice stated the reasons for the decision (February 29th).

Plaintiff argues that the institution's internal working papers should also have stated the reasons for the non-renewal decision. There is nothing ambiguous about this portion of the contract. The clear and plain meaning of the terms of the contract do not impose this requirement. The existence of the rights and obligations of parties to a contract are determined by the language of the contract, which must be construed according to the plain meaning of its terms. Western Cas. & Sur. Co. v. Waisanen, 653 FSupp 825, 827 (DSD 1987) (applying South Dakota law on a duty to defend issue); Alverson v. Northwestern Nat. Cas. Co., 1997 SD 9, ¶8, 559 NW2d 234, 236; Biegler v. American family Mut. Ins. Co, 2001 SD 13, ¶20, 621 NW2d 592, ____. The contract doesn't require that the internal working papers contain a statement of the reasons as long as the notice to the party being terminated contains the reasons. This Court will not impose requirements in a contract that the parties didn't include. The ALJ was correct in finding that there was no breach of this portion of the contract.

Plaintiff also claims that his supervisor had made up his mind about non-renewal prior to the meeting held on February 27th. By the terms of the COHE contract, plaintiff's supervisor was obligated to tell him at this meeting of the "proposed action." The supervisor necessarily had to have made up his mind about what he was going to do before the meeting, as he was obligated to convey that information to the plaintiff at the meeting. The ALJ was correct in finding that there was no breach of this portion of the contract.

The ALJ made a determination that the evaluation had taken place which is a factual finding to which this Court must give great deference. The court must uphold this

finding if there is any evidence to support it. The court does not substitute its judgment for Department's on the weight of evidence pertaining to questions of fact unless Department's decision is clearly erroneous, or is arbitrary, capricious, or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.

In this case there was evidence of an evaluation done by plaintiff's supervisor. There was also evidence of numerous other contacts between plaintiff, his supervisor and the associate dean, in an effort to improve his teaching performance.[4] Clearly there was a substantial compliance with the evaluation portions of the COHE contract. This court will not substitute its judgment for the Department of Labor's. The Department's findings are not clearly erroneous, or arbitrary, capricious, or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.

It also appears that the ALJ found that §§ 2.1 through 2.3 of the COHE contract have no application to the renewal of a contract, which would be a conclusion of law subject to a de novo review by this Court.

. § 1.7 is one portion of the COHE contract dealing with "Nonrenewal of Tenure Track Contracts." §§ 2.1 through 2.4 is a completely separate portion of the contract dealing with "Evaluations." No portion of 1.7 incorporates or refers to the Evaluation portion. No portion of 2.1 through 2.4 incorporates re refers to non-renewal of employment contracts. In fact, §2.1(5)(e) indicates that the evaluation

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[4] Plaintiff admits that an evaluation took place because he attacks the statements made in the evaluation. His supervisor indicated in the evaluation that student evaluations of plaintiff were unfavorable. Plaintiff attacks this as a violation of § 2.3(3) of Division II of the COHE contract. However, plaintiff ignores the explicit language of § 2.3 which allows the use of student opinion surveys as part of the evaluation process provided that they are corroborated.

process can be used to justify alternative disciplines but makes no mention of non-renewal decisions.

Under different facts, but in a similar context, the Supreme Court in Beville v. University of South Dakota, supra held that a portion of the COHE Contract dealing with prescriptive plans had nothing to do with portion of the COHE Contract dealing with tenure decisions.

§ 1.7 of Division II of the COHE contract dealing with "Nonrenewal of Tenure Track Contracts" appears to be a complete and comprehensive procedure for handling non-renewal decisions. No part of that complete procedure involves evaluations. § 7.1(4) of Division I indicates that one of the purposes of the evaluations is to provide information for personnel decisions such as contract renewal. Noting in this section indicates that evaluations are the sole and exclusive source of information for personnel decisions. Most importantly, nothing in this section indicates that personnel decisions can not be made in the absence of an evaluation. The caption for this section cross-references to Division II, Article II and Division III, Article II but does not cross-reference to Division II, Article I (which contains the non-renewal sections). There is no portion of the COHE contract which supports plaintiffs premise that a properly completed faculty evaluation is a prerequisite to renewal decisions. This Court concludes that ALJ was correct in finding that §§ 2.1 through 2.3 of the COHE contract have no application to the non-renewal procedure set out in § 1.7 of the contract.

Plaintiff also complains that the Student Opinion Surveys were the "controlling criterion" in the non-renewal decision. There is nothing in the record which supports this claim. As pointed out above (in footnote 4) Student Opinion Surveys may be used as part of the evaluation process. Plaintiff errs in equating the evaluation and the non-renewal

process. In addition, the meaning of the term "controlling" goes far beyond the meaning of "primary."[5]

B. Academic Freedom

The second issue raised by plaintiff is his claim that the actions of the University Administration infringed on his academic freedom. In regard to that claim the ALJ found as follows:

> Finding of Fact XI. Myers and Reinke made no attempt to foist upon Petitioner certain methods of teaching or course content.
>
> And
>
> Conclusion of Law III. Petitioner's academic freedom was not infringed in any manner.

There were both findings of fact and a conclusion of law involved in this issue. As pointed out above, conclusions of law are given no deference on appeal and are freely reviewable but, in regard to findings of fact, the court does not substitute its judgment for the ALJ's on the weight of evidence pertaining to questions of fact unless the ALJ's decision is clearly erroneous, or is arbitrary, capricious, or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.

After a full review of the facts in this case, this Court can not find any evidence that either plaintiff's supervisor or the associate dean infringed on his academic freedom in any manner. Plaintiff's arguments are essentially contradictory. He argues that his supervisor didn't make enough of an effort to help him change his teaching to comply with their

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[5] Control means to exercise control over, to dominate or direct while primary means the first or highest in rank of importance. An item can be primary without being controlling.

expectations but on the other hand, he argues that the efforts which were made, infringed on his academic freedom. This Court does not find that this finding by the Department is clearly erroneous, or is arbitrary, capricious, or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion. This Court will uphold the decision of the ALJ in finding that there was no infringement on plaintiff's academic freedom.

CONCLUSION

While not in any way justifying any negligence or failure on the part of defendants which prevented plaintiff from having his appeal fully and fairly heard, this Court concludes that plaintiff would not have prevailed in his appeal. Consequently, he did not suffer any loss or detriment as a result of the alleged negligence on the part of defendants. Defendants motion for summary judgment is granted. Counsel for defendants may prepare an order in accordance with this memorandum opinion.

Cc: Yankton County Clerk of Courts (original for the file)

APPENDIX B: OPINION, APPEAL #22617, SOUTH DAKOTA SUPREME COURT, APPEAL FROM THE FIRST JUDICIAL CIRCUIT, YANKTON COUNTY, SOUTH DAKOTA, HORABLE ARTHUR L. RUSCH, JUDGE, FILED SEPTEMBER 3, 2003

Thomas J. Yarcheski
Appellant

v.

Kevin Reiner, Celia Miner, and Johnson, Heidepreim, Miner, Marlow & Janklow, LLP,
Appellees

Considered on briefs on April 24, 2003

Judges: Before: Chief Justice David Gilbertson, Justices Richard W. Sabers, John K. Konenkamp, Judith K. Meierhenry, and Retired Justice Robert A. Miller (sitting for Steven L. Zinter, disqualified); Opinion by Konenkamp

[¶1.] Following his unsuccessful challenge to the procedures by which his university tenure-track contract was not renewed, plaintiff appealed in circuit court. His appeal was dismissed, however, when his attorneys submitted an untimely brief. He then brought a legal malpractice suit against his attorneys. In granting summary judgment for the attorneys, the circuit court ruled that plaintiff would not have prevailed in his administrative appeal even if his brief had been timely filed.

I.

[¶2.] Plaintiff, Thomas J. Yarcheski, Ph.D., was a first-year tenure track faculty member employed at the University of South Dakota during the 1991-92 school year. He served as an Associate Professor, teaching Health Services Administration at the School of Business. Early in his first semester, several students came to Associate Dean Robert Reinke with complaints about Yarcheski's teaching. These ranged from criticism of his arrogance in the classroom to dissatisfaction with his disorganized teaching style. Yarcheski later acknowledged that his teaching style differed from what many students expected. In was his object to pursue greater academic standards than those sought by his colleagues on the faculty.[1] To this end, he required more student interaction, avoided lecturing directly from the text, and chose not to design his lectures simply to provide an outline of material.

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[1] His previous position was Associate Professor and Program Director at St. Joseph's College in Maine. Although Yarcheski quotes the President of St. Joseph's in rating his teaching performance as "masterful," his contract there was also not renewed because of his teaching performance. He filed a grievance claiming that the college did not follow proper procedures for nonrenewal. His grievance was unsuccessful, as was his subsequent lawsuit.

[¶3.] As a result of the complaints, Reinke and the Director of the Department of Health Services Administration, Professor Michael J. Myers, met with Yarcheski informally several times to make suggestions on how he might improve the organization and presentation of his course material. Yarcheski was not altogether responsive to these suggestions. For instance, he reacted inappropriately to the suggestion that he refer to the textbook during his lectures. He returned to his class and read the text to the students—"If you want to be involved with the text, I'll get you involved in the text."

[¶4.] Reinke and Myers also suggested to Yarcheski that they attend his classes and that a student committee be created to expedite student feedback. Yarcheski declined both suggestions. He said that their attending his classes would undermine his credibility. He told them, "I [want to] solve the problem myself." As to the student committee idea, Yarcheski thought that it would violate his academic freedom. Although they had the authority to override his requests, Myers and Reinke acquiesced. "Hang in there," Yarcheski told them, "I'll turn this around; I've been down this road before."

[¶5.] As an alternative, Yarcheski suggested that in addition to the student evaluation forms used by the university that "Harvard" evaluations forms be distributed. Harvard evaluations are open-ended invitations to students to evaluate their learning experience. After reviewing the Harvard evaluations completed at the end of the fall semester, Myers sent Yarcheski a memorandum dated January 20, 1992, outlining steps to be taken in the next nine days. The steps included attendance by Myers and Reinke in Yarcheski's classes, their review of student research papers and examinations, a self-assessment and corrective action plan to be prepared by Yarcheski, and a redistribution of the Harvard evaluation forms. Myers explained the reason for these measures:

> The issue of contract renewal, as you can appreciate, has arisen in the wake of the widespread student criticism of your teaching technique and presentation. That criticism was generally affirmed in the "Harvard" evaluations submitted by the students in your Long-Term Care and Systems courses, offset [by] a minority view that was favorable.

The memorandum explained that the university's internal deadline for recommending contract renewal was January 31. These steps, Myers wrote, "will allow us to substantiate a rationale for contract renewal, or if we are unable to obtain a more favorable assessment, provide a fair and objective basis for nonrenewal."[2]

[¶6.] Parts of this plan were never completed. Yarcheski gave Myers two grocery bags containing student work product, but Myers deemed this material irrelevant because it "would not permit a basis for meaningful comparative assessment of teaching performance." Myers had previously seen copies of student papers with Yarcheski's commentary and "markup," and on at least one prior occasion, he reviewed a draft copy of one of Yarcheski's exams. Both Reinke and Myers attended one of Yarcheski's classes. Although neither reduced their findings to writing, they informed Yarcheski directly of their observations. Myers told him on January 24 that his class presentation was "fairly rambling" and that it was not "a particularly well-taught class." Reinke also told him that the class he observed was "in general, poorly conducted." Reinke also told Myers that

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[2] In the fall semester, Reinke explained to Yarcheski that the assessment "criteria we use is thoroughly described in the faculty handbook under teaching, research, and service." The handbook categorizes performance as excellent, satisfactory, unsatisfactory, and provides descriptions. Reinke and Myers told Yarcheski that their assessment of his performance was directly related to "the competencies described in the faculty handbook in regards to teaching."

he "was not satisfied with the style and the content of the class." Myers passed this on to Yarcheski. In response, Yarcheski sent Reinke a memorandum documenting their communication on these observations.[3]

[¶7.] In a letter dated January 31, 1992, Myers recommended to the Dean and Associate Dean that Yarcheski's contract not be renewed. In turn, the Dean sent a memorandum to the Vice President of Academic Affairs:

> Consistent with the guidelines set forth in the BOR/COHE Agreement Division II, Section 1.7, I am recommending that [Dr.] Thomas Yarcheski, Health Services Administration,... be notified that [he] will not be offered a faculty contract FY 93. Dr. Yarcheski began his work with us FY 92 on a tenure track contract and has been unable to provide the Health Services program with the level of teaching performance necessary to maintain HSAD's quality reputation. After numerous meetings with related supervisors/administrators, classroom observations, and substantial student input, I am not convinced that Dr. Yarcheski is willing or perhaps able to change his teaching behavior enough to meet the standards of our program.

[¶8.] On February 20, 1992, Myers gave Yarcheski his Professional Staff Evaluation, as required by the Agreement between the South Dakota Board of Regents and the Council of Higher Education (BOR/COHE). In his evaluation

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[3] When later questioned in the grievance hearing, Reinke said that he thought Yarcheski was warm and caring with the students as individuals, but his deficiencies were in the classroom. According to Reinke, Yarcheski "would be an excellent graduate-level instructor," having a "great mind," but he was not "communicating well," was not "instructing his undergraduate students well."

instrument, Myers rated Yarcheski unsatisfactory in teaching. The accompanying comment stated, "[s]tudent evaluations indicated students did not learn relevant material. Indicated assignments were not helpful, and there was a lack of systematic presentations." Yarcheski was also rated unsatisfactory in research but excellent in service.

[¶9.] In a letter dated February 19, 1992, Yarcheski was given written notice of his opportunity to meet with Myers on February 27, 1992, before the issuance of a notice of nonrenewal. This meeting was held as scheduled. Finally, on February 29, 1992, University President Betty Turner Asher informed Yarcheski by letter that his contract would not be renewed for the 1992-93 academic year. The letter explained "[t]he reason for this action is inadequate teaching."

[¶10.] Yarcheski filed three grievances. The first was before the notice of nonrenewal, requesting abrogation of the recommendations of nonrenewal and formal participation in the process of professional evaluation. The second was on the performance evaluation. The third was in response to his notice of nonrenewal. The grist of his complaints was that his nonrenewal resulted solely from student evaluations. As he would later explain, "the evaluation of teaching performance belongs to the professoriat; we have a duty to evaluate each other; I don't believe it's the duty of students to evaluate the professoriat." The grievances were denied.

[¶11.] Yarcheski hired attorney Celia Miner of the Johnson, Heidepreim, Miner, Marlow & Janklow law firm. Kevin Reiner, an associate in the firm, assisted her. They pursued an appeal to the South Dakota Board of Regents and the Department of Labor. Both ruled against Yarcheski, concluding that proper nonrenewal procedures were followed.

[¶12.] Yarcheski then directed his attorneys to appeal the Department of Labor's decision to the circuit court.[4] A Notice of Appeal was filed on March 10, 1994. Although Reiner left the law firm in 1994, he assisted in preparing an opening brief, which was submitted on April 13, 1995. On the motion of the South Dakota Board of Regents, the circuit court dismissed the appeal because the brief had not been timely filed. Yarcheski appealed to this Court, and we summarily affirmed.

[¶13.] Yarcheski then brought this legal malpractice action against Reiner, Miner, and their law firm. Following the withdrawal of his new attorney, Yarcheski decided to represent himself. Both sides moved for summary judgment. The circuit court ruled that Yarcheski would not have prevailed on his administrative appeal, and thus his legal malpractice claim was deficient as a matter of law. The court granted summary judgment to the defendant attorneys. On appeal to this Court, Yarcheski presents the following issues: (1) "Did [the defendant attorneys] commit legal malpractice when they missed a filing deadline in the Sixth Judicial Court in 1995 resulting in the [plaintiff's] case being dismissed." (2) "Would the plaintiff have prevailed, upon appeal, in his original grievance against the University of South Dakota?"

II.

[¶14.] Evaluating academic performance is a venture beyond our expertise and our jurisdiction. In reviewing decisions concerning academic performance, our role is limited to inspecting the contract and examining the administrative proceedings to learn whether the evidence

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[4] Although Yarcheski wanted to proceed with this appeal, he had not been paying the law firm's bills. Instead, he declared bankruptcy. Nonetheless, his attorneys continued to represent him in the circuit court appeal.

supported the determination. SDCL 1-26-37. We examine a contract as a whole, giving meaning, if possible, to all its provisions. Enchanted World Doll Museum v. Buskohl, 398 NW2d 149, 151-52 (SD 1986). Fundamental to maintaining academic excellence, faculty evaluations retain a singular importance in educational institutions. Universities have a vital interest in retaining and promoting only the best faculty members. Conversely, faculty members have an equally vital interest in receiving fair evaluations. *See generally* Ford v. Nicks, 741 F2d 858, 864 (6thCir 1984); Lieberman v. Gant, 630 F2d 60, 67 (2ndCir 1980)(courts should not set as "Super-Tenure Review Committees").

[¶15.] In this case, the circuit court granted a summary judgment. Our standard for reviewing summary judgments has been recited in numerous cases and need not be repeated in detail here. *See* Kobbeman v. Oleson, 1998 SD 20, ¶4, 574 NW2d 633m 635. In accord with this standard, we view the facts in a light most favorable to Yarcheski as the opposing party. The burden remains on the defendant attorneys to prove the absence of any genuine issue of material fact and entitlement to judgment as a matter of law. State Dep't of Revenue v. Thiewes, 448 NW2d 1, 2 (SD 1989).

III.

[¶16.] This legal malpractice action originates from the failure to timely file a brief in Yarcheski's appeal. Because the brief was filed late, the appeal was lost. However, that result, by itself, does not mean that Yarcheski wins his suit. To prevail in his legal malpractice action, Yarcheski must first prove the four basic elements of negligence: (1) an attorney-client relationship giving rise to a duty; (2) the attorneys, either by an act or a failure to act, violated or breached that duty; (3) the attorney's breach of duty proximately caused injury to the client; and (4) actual injury,

loss, or damage. Keegan v. First Bank of Sioux Falls, 519 NW2d 607, 611 (SD 1994)(citation omitted). On the element of proximate cause, Yarcheski must prove that the underlying claim was valid and would have resulted in a favorable and collectible judgment had it not been for the attorney's error.[5] Haberer v. Rice, 511 NW2d 279, 284-85 (SD 1994). Thus, Yarcheski must prove two distinct cases in a single proceeding.

[¶17.] As did the trial court, we probe one element necessary in an appellate legal malpractice claim, i.e., proof that the client would have prevailed in the appeal. That element behooves us to touch on an issue of first impression in South Dakota: is the question whether the appeal would have been successful a question for the court or the jury? *Haberer* addressed methods by which a legal malpractice claim can be submitted to a jury. *Id.* at 285. This case is different, however, because the action giving rise to the malpractice claim was an administrative appeal. *See* SDCL Ch 1-26. Administrative appeals, like all appeals, are not decided by juries. SDCL 1-26-30.2 provides that "[a]n appeal shall be allowed in the circuit court to any party in a contested case from the final decision, ruling or action of an agency." And "[t]he review shall be conducted by the court without a jury and shall be confined to the record." SDCL 1-26-35.

[¶18.] In examining this question, the Supreme Court of Michigan ruled that whether an appeal would have succeeded if it had been properly pursued is an "issue for the court because the resolution of the underlying appeal originally would have rested on a decision of law." Charles

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[5] In an action for appellate legal malpractice the plaintiff must prove two aspects of causation: whether the attorney's negligence caused the loss or unfavorable result of the appeal, and whether the loss or unfavorable result of the appeal in turn caused a loss or unfavorable result in the underlying litigation. 2RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 24.39, (3dEd 1989).

Reinhart Co. v. Winiemko, 513 NW2d 773, 777 (Mich 1994). The *Reinhart* court adopted the reasoning of the Texas Supreme Court in Millhouse v. Wiesenthal, 775 SW2d 626, 628 (Tex 1989):

> The question of whether an appeal would have been successful depends on an analysis of the law and the procedural rules. [The plaintiff"] petition that the jury should make this determination as a question of fact would require the jury to sit as appellate judges, review the trial record and briefs, and decide whether the trial court committed reversible error. A judge is clearly in a better position to make this determination. Resolving legal issues on appeal is an area exclusively within the province of judges....

We find this rationale persuasive and conclude that in an appellate malpractice action the question whether the appeal would have been successful if it had been properly pursued is a legal matter to be resolved by the court.

IV.

[¶19.] Although his attorneys filed an untimely brief, Yarcheski does not contend that its content was deficient. Indeed, he makes essentially the same arguments in this appeal that his attorneys made for him in the aborted circuit court appeal. The essence of his claim is that the evaluation and nonrenewal processes are contractually sequenced so that the decision not to renew must follow only from an adequate written evaluation in compliance with the BOR/COHE agreement.

[¶20.] Division II, 2.1 of the BOR/COHE contract, entitled "Performance Evaluation Guidelines," provides that "all faculty unit members will be evaluated annually." Yarcheski was a "faculty unit member" under Division I,

1.7. The performance evaluation must be in "written form," as required by Division II, 2.1 (2). Division II, 2.2 (3) states: "Included in the evaluation must be comments about the faculty unit member's performance in each of the areas of teaching, research and scholarship, and service." Under Division II, 2.2 (5), one of the purposes of the written evaluation is to allow the vice president or dean to review it and "make appropriate comments to the president about contract renewal...." In Division II, 2.3, the contract states that "Student opinion surveys will be used as part of the evaluation of faculty unit members, along with other procedures set forth in this article." However, per Division II, 2.3(3), "Student opinion surveys will not be used as the controlling criterion for personnel actions."

[¶21.] A written evaluation was given to Yarcheski by his immediate administrative supervisor on February 20, 1992. By the terms of Division II, 2.2, evaluations must be completed "[p]rior to the last day of February," and under Division II, 1.7, notices of nonrenewal must be given before March 1. Obviously, February 19 is "prior to the last day of February," thus it appears that the evaluation was completed in a timely manner. Although the evaluation was timely, Division II, 2.2(3) further states that "[o]bservations may include, but do not require, classroom observations, unless there is good cause to suspect serious deficiencies in performance." Yarcheski's evaluation required classroom observation because the administration had suspected "serious deficiencies in performance."

[¶22.] Yarcheski argues that his written evaluation was deficient in failing to state any criteria other than student evaluations. It simply states: "Teaching—Student evaluations indicated students did not learn relevant material, indicated assignments were not helpful, and there was a lack of systematic presentations. Rating—Unsatisfactory." While student opinion surveys may not be the determinative factor in "personnel actions," an evaluation itself is not a

personnel action. According to Division I, VII, 7.1 (4), a personnel action includes "discipline, contract renewal, salary and pay matters, tenure, and promotion."

[¶23.] Despite Yarcheski's objections to the form of his written evaluation, the record contains ample evidence that he was fully evaluated in his job performance through his many meetings with Myers and Reinke. Although the evaluation has no notations documenting classroom observation, both Myers and Reinke did in fact observe Yarcheski in class.[6] Because the academic evaluation process is partly subjective and thus less susceptible to precise judicial review, courts have held that the nonrenewal process need not be perfect: substantial compliance is all that is required. As the North Dakota Supreme Court observed in Stensrud v. Mayville State College, 368 NW2d 519 522 (ND 1985), "Generally, substantial compliance with the procedural requirements for termination is sufficient if their purpose is fulfilled." Likewise, in Piacitelli v. Southern Utah State College, 636 P2d 1063 (Utah 1981), the Utah Supreme Court concluded:

> While exact conformance with the precise terms of the termination procedures is doubtless the least controversial course, so long as the substantial interests those procedures are designed to safeguard are in fact satisfied and protected, failure to conform to every technical detail of the termination procedure is not actionable.

We apply the same standard in South Dakota. We will not override the university's judgment when contract procedures were substantially complied with and the interests of the parties were satisfied. Beville v. University of South

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[6] Myers later testified that on hindsight he "would have made it clear [in the written evaluation] that the conclusion with regard to his teaching performance was strongly influenced by, but not controlled by, student evaluation."

Dakota, 420 NW2d 9, 14 (SD 1988). Consequently, assuming for the sake of argument that the form of the evaluation was a violation of the BOR/COHE agreement, the evaluation procedures were nonetheless substantially fulfilled.

[¶24.] We come now to the heart of this case. The controlling question here is not whether the annual performance evaluation was fully completed in accord with the BOR/COHE, but whether such written evaluation was a condition precedent to nonrenewal. Our answer must come from the contract. The rights and obligations of parties to a contract are determined solely by the contract language, which must be construed according to the plain meaning of its terms. Biegler v. American Family Mut. Ins. Co., 2001 SD 13, ¶20, 621 NW2d 592, 598-99. Contract interpretation if a question of law. State Farm Mut. Auto. Ins. Co. v. Vostad, 520 NW2d 273, 275 (SD 1994).

[¶25.] In Division II, 1.7, entitled "Nonrenewal of Tenure Track Contracts," the pertinent language states:

> Prior to the issuance of a written notice of nonrenewal, the faculty unit member's immediate supervisor will provide the opportunity for a meeting with the faculty unit member to apprise the faculty unit member of the proposed action. The faculty unit member will be given at least five (5) working days written notice of such meeting so that both the faculty unit member and the immediate supervisor may arrange to have present a witness or a representative.
>
> In order to facilitate the relocation of faculty unit members who are not to be rehired, *the administration agrees to provide notice of its intent not to rehire any faculty unit members serving under a tenure track contract. The notice will state the reasons for*

the decision and will be given in accordance with the following schedule:

1. A faculty unit member who has completed less than one (1) academic year of service under a tenure track contract shall receive written notice of nonrenewal from the institution before March 1 of the current year of appointment.

* * *

(Emphasis added.) The remaining, unquoted portions of this section provide for graduated protections to tenure track faculty members as their terms of service increase beyond one year. Yarcheski was a faculty unit member who had completed less than one academic year of service. No part of Division II, 1.7 mandates an evaluation before a nonrenewal decision. Nontenured faculty members are essentially year-to-year employees. The process for nonrenewal for such employees only requires (1) an opportunity to meet, on five day's notice, with the tenure track faculty member's immediate supervisor to be appraised of the proposed action, and (2) written notice stating the reasons for nonrenewal.

[¶26.] On February 19, 1992, before the issuance of a notice of nonrenewal, Yarcheski's supervisor, Myers, advised him of the proposed action and provided a meeting date of February 27, 1992. In accord with the requirement of Division II, 1.7(1) that notice be given before March 1 of the current year of appointment, Yarcheski had written notice of nonrenewal from the university on February 29, 1992. As required by the contract, the written notice further declared the reason for nonrenewal as "inadequate teaching." Thus, the university complied with Division II, 1.7.

[¶27.] Division I, 7.1(4), entitled "Evaluation—General Provisions," states that "[t]he purpose of the evaluation will be to:..[p]rovide basic information for personnel decisions such as discipline, *contract renewal*, salary and pay matters,

tenure, and promotion." (Emphasis added.) Further, Division II, 2.2 (5) states: "The vice president/dean will review the completed evaluation and make appropriate comments to the president about contract renewal,..." Yarcheski contends that because one purpose of the evaluation is to provide information on contract renewal decisions, a properly completed faculty evaluation is a condition precedent to a valid nonrenewal decision.

[¶28.] Certainly, these provisions contemplate that the information in the evaluation will be used to make contract renewal decisions. But nothing in the evaluation and nonrenewal provisions indicates that the evaluation is the exclusive source of information for personnel decisions. Nor does any provision suggest that a written evaluation form in full compliance with the BOR/COHE contract is a prerequisite to a decision to nonrenew. In fact, the caption for Division I, 7.1 cross-references Division II, Article II and Division III, Article II, but does not cross-reference Division II, Article I containing the nonrenewal sections. We find no provision of the BOR/COHE contract that supports Yarcheski's premise that the criteria used in the decision not to renew must be set out in the performance evaluation as a prerequisite to a valid nonrenewal decision. Courts will not impose requirements in a contract that the parties themselves failed to include. Raben v. Schlottman, 77 SD 184, 190, 88 NW2d 205, 208 (1958). The ALJ and the circuit court were correct in finding that compliance with Division II, 2.1 through 2.3 is not a prerequisite to the nonrenewal procedure set forth in Division II, 1.7 of the BOR/COHE contract.

VI.

[¶29.] Yarcheski's final assertion is that the university violated his academic freedom. As stated in Division I, 10.1 of the BOR/COHE contract, "subject to accepted standards of professional responsibility," academic freedom "is

intended to guarantee those rights which are recognized as flowing from the First Amendment to the United States Constitution." The contract defines academic freedom to include "the right to study, discuss, investigate, teach and publish." More particularly, this section explains: "Faculty unit members are entitled to freedom in the discussion and presentation of their subject and are privileged to introduce various scholarly views."

[¶30.] Yarcheski believes that overreliance on student surveys infringed on his academic freedom. In his words,

> The issue of academic freedom in this case involves students judging members of the academy. It involves students controlling the destiny of faculty through their opinions and opinion surveys.... The administrators at the University of South Dakota, particularly at the School of Business, exercised no significant judgment with respect to the opinions of students concerning the teaching of faculty.

It is true that his written evaluation mentioned only student surveys. Nonetheless, after their personal observations of his classes, both Reinke and Myers concluded that his performance was unsatisfactory. Moreover, the action plan and the many conferences that they had with Yarcheski to improve his teaching cannot be understood as anything less than an expression by his supervisors of serious concern with his teaching abilities.

[¶31.] In concluding that Yarcheski's "academic freedom was not infringed," the ALJ found that Myers and Reinke made no attempt to "foist upon Yarcheski certain methods of teaching or course content." Aside from whether this finding correctly frames the scope and measure of academic freedom as between professors and administrators, we can only note that Yarcheski cites no case authority to support his argument. We readily acknowledge, nonetheless, that academic freedom generally assures to educators freedom in

their First Amendment pursuits from interference not only by administrators and other faculty, but by students as well. In any event, the circuit court ruled that "[a]fter a full review of the facts in this case, this court cannot find any evidence that either Yarcheski's supervisor or the associate dean infringed on his academic freedom in any manner."

[¶32.] University faculty members may establish an infringement of academic freedom if the decision not to rehire them was made because of their exercise of constitutionally protected First Amendment freedoms. Mt. Healthy City School Dist. Bd. Of Educ. V. Doyle, 429 US 274, 283-84, 97 SCt 568, 50 Led2d 471 (1977); Pickering v. Bd. Of Educ., 391 US 563, 574, 88 SCt 1731, 20 Led2d 811 (1968). Untenured employees enjoy the same freedoms. *See* Perry v. Sinderman, 408 US 593, 597-98, 92 SCt 2694, 33 Led2d 570 (1972). On the other hand, universities have an interest as employers "in promoting the efficiency of the public services" they perform through their faculty members. *Pickering*, 391 US at 568, 88 SCt at 1734-35, 20 Led2d at 817. Under the aegis of academic freedom, a university may "determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." Sweezy v. New Hampshire, 354 US 234, 263, 77 SCt 1203, 1218, 1 Led2d 1311 (1957) (Frankfurter, J., concurring in result).

[¶33.] Education officials may decline to renew a contract for academic reasons unrelated to academic freedom, such as inadequacy in teaching or failure to obey legitimate administrative directives. *See* Adams v. Campbell County School Dist., 511 F2d 1242 (10th Cir 1975); Ahern v. Bd. Of Educ. Of School Dist. Of Grand Island, 456 F2d 399 (8thCir 1972); Chung v. Park, 514 F2d 382 (3dCir), cert. Denied, 423 USW 948, 96 SCt 364, 46 Led2d 282 (1975). In fact, a university may lawfully choose not to renew the contract of a nontenured professor whose pedagogical attitude and teaching methods fail to conform to institutional standards.

Hetrick v. Martin, 480 F2d 705, 708 (6thCir), cert. Denied, 414 US 1075, 94 SCt 592, 38 Led2d 482 (1973). *Hetrick* dealt with the administration's dissatisfaction over a nontenured professor's teaching methods and ability. There, the Sixth Circuit Court of Appeals found that no First Amendment interests were implicated when a university decided not to renew the contract of a nontenured professor because of her teaching style and methods. *Id.* Numerous students had complained about "their ability to comprehend what she was attempting to teach them or what was expected of them." *Id.* at 706. The First Amendment guarantee of academic freedom does not require a university to tolerate any manner of teaching method a professor may choose to employ. *Id.* at 707.

[¶34.] Yarcheski never explains how his inadequate teaching style, as evaluated by the university as well as many of his students, fits under the protection of academic freedom. Nor does he submit any legal justification to prohibit student input on faculty performance. To maintain academic excellence, institutions of higher learning must ensure that their students have the benefit of the best education. The university's choice in using student surveys as part of its effort to fulfill that goal is not an infringement of academic freedom. Surely, educational institutions have the right to expect that their teachers will be able to teach.

[¶35.] For the foregoing reasons, we conclude that Yarcheski would not have prevailed in the appeal from his grievance against the University of South Dakota; therefore, his claim for legal malpractice fails for lack of proof of an essential element.

[¶36.] Affirmed.

[¶37.] GILBERTSON, Chief Justice, and SABERS and MEIERHENRY, Justices, and MILLER, Retired Justice, sitting by Order of the Court, concur.

[¶38.] MILLER, Retired Justice, sitting for ZINTER, disqualified.

APPENDIX C—IN THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA, ORDER DENYING REHEARING (#22617), DAVID GILBERTSON, CHIEF JUSTICE, FILED OCTOBER 21, 2003

Thomas J. Yarcheski,
Plaintiff and Appellant

Vs.

Kevin L. Reiner, Celia Miner and Johnson, Heidepreim, Miner, Marlow & Janklow, LLP,
Defendants and Appellees

A petition for rehearing in the above cause having been filed September 19, 2003, and no issue or question of law or fact appearing to have been overlooked or misapprehended, and more than fifteen days having elapsed therefrom and no written statement having been filed with the Clerk of this Court by a majority of the justices requesting a rehearing, now, therefore, in accordance with the Rehearing Procedure Rule of this Court, the petition for rehearing is denied.

DATED at Pierre, South Dakota, the 21st day of October, 2003.

ATTEST: Shirley Jameson-Fergel, Clerk of the Supreme Court, by Cindy Leichtnam, Chief Deputy Clerk (with seal)